

Congress of the United States
U.S. House of Representatives
Committee on Small Business
2361 Rayburn House Office Building
Washington, DC 20515-6515

To: Members, Committee on Small Business
From: Committee Staff
Date: May 6, 2013
Re: Hearing: "Retrospective Review: Have Existing Regulatory Burdens on Small Businesses Been Reduced?"

On Wednesday, May 8, 2013 at 1:00 pm in Room 2360 of the Rayburn House Office Building, the Committee on Small Business will meet for the purpose of examining whether agencies' efforts to review their existing regulations, as ordered by President Obama, are resulting in meaningful burden reductions for small businesses. This hearing is an opportunity to investigate the outcomes of the agencies' efforts.

I. Introduction

Every President since President Carter has ordered agencies to periodically review their existing regulations.¹ Since 1980, Congress also directed all federal agencies to conduct a review of each regulation that has or will have a significant economic impact on a substantial number of small entities (which includes small businesses) at least every 10 years after the date of promulgation. 5 U.S.C. § 610. However, a series of Government Accountability Office (GAO) studies have found that agencies infrequently performed certain types of reviews.² GAO reported that agencies were not conducting the congressionally mandated periodic reviews and enumerated a number of challenges to conducting reviews of existing regulations.³

Despite the difficulties with previous retrospective review efforts, President Obama issued Executive Order 13,563 directing federal agencies to implement a plan for retrospectively reviewing all their regulations.⁴ Specifically, the President ordered the agencies to focus on those rules that were "outmoded, ineffective, insufficient, or excessively burdensome."⁵ After

¹ A brief history of Presidentially ordered retrospective reviews can be found in the Committee on Small Business's September 21, 2011 hearing memorandum, available at http://smallbusiness.house.gov/uploadedfiles/9-21_memo.pdf.

² GAO, REEXAMINING REGULATIONS: OPPORTUNITIES EXIST TO IMPROVE EFFECTIVENESS AND TRANSPARENCY OF RETROSPECTIVE REVIEWS 11 (GAO-07-791) (2007).

³ See *Id.* at 11; GAO, REGULATORY FLEXIBILITY ACT: CONGRESS SHOULD REVISIT AND CLARIFY ELEMENTS OF THE ACT TO IMPROVEMENT ITS EFFECTIVENESS 6 (GAO-06-998T) (2006); GAO, REGULATORY FLEXIBILITY ACT: AGENCIES' INTERPRETATIONS OF REVIEW REQUIREMENTS VARY 2 (GAO/GGD-99-55) (1999).

⁴ 76 Fed. Reg. 3821 (Jan. 21, 2011), reprinted in 3 C.F.R. 215 (2012).

⁵ *Id.* at § 6, 76 Fed. Reg. at 3822, 3 C.F.R. at 217.

identification, the agencies were directed “to modify, streamline, expand, or repeal them in accordance with what has been learned.”⁶ Pursuant to the directive of the President, agencies released their final retrospective review plans in August 2011. Compliance with the order, including general oversight of the review plans, was vested with the Office of Management and Budget’s Office of Information and Regulatory Affairs (OIRA).⁷ The President supplemented the retrospective review order with Executive Order 13,610,⁸ which emphasized the importance of public participation in the retrospective review process, provided guidance on prioritization of reviews and set a schedule for agencies to report on the status of their retrospective review efforts.

II. The Retrospective Review Process

A. Oversight of the Retrospective Review Process

Following the issuance of the order mandating the review, OIRA issued guidance to the agencies.⁹ The guidance required agencies to focus reviews on regulations that maximize burden reduction (be it paperwork or otherwise), especially for small businesses.¹⁰ Additional guidance focused on the importance of considering cumulative effects of new and existing rules as part of agencies’ retrospective review efforts.¹¹ Most significantly, OIRA emphasized that the review process was and is not a one-time effort but an ongoing process.¹²

B. Development of Agency Plans

The final plans for reviewing existing regulations were developed by: 1) soliciting input from the general public;¹³ 2) utilizing already established processes to review regulations, including

⁶ *Id.*

⁷ *Id.*

⁸ 77 Fed. Reg. 28,469 (May 14, 2012).

⁹ See OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: IMPLEMENTATION OF RETROSPECTIVE REVIEW PLANS (2011), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/implementation-of-retrospective-review-plans.pdf> [hereinafter Retrospective Review Implementation]; OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: CUMULATIVE EFFECTS OF REGULATIONS (2012), available at <http://www.whitehouse.gov/sites/default/files/omb/assets/inforeg/cumulative-effects-guidance.pdf> [hereinafter Cumulative Effects]; OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, MEMORANDUM FOR THE HEADS OF EXECUTIVE DEPARTMENTS AND AGENCIES: REDUCING REPORTING AND PAPERWORK BURDENS (2012), available at <http://www.whitehouse.gov/sites/default/files/omb/inforeg/memos/reducing-reporting-and-paperwork-burdens.pdf> [hereinafter Reducing Burdens].

¹⁰ Retrospective Review Implementation, *supra* note 9, at 1.

¹¹ Cumulative Effects, *supra* note 9, at 1.

¹² Retrospective Review Implementation, *supra* note 9, at 1.

¹³ Some agencies limited their efforts to seek public input to publishing a request for information and notice of the availability of their preliminary plan in the Federal Register and on their website. UNITED STATES DEPARTMENT OF THE TREASURY, FINAL PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 3 (2011). Other agency public outreach efforts were more elaborate and included: posting notices in the Federal Register; holding public meetings; using IdeaScale to create a website to solicit input; issuing press alerts; sending emails to stakeholder groups; and posting information prominently and on multiple pages of the agency’s website. UNITED STATES DEPARTMENT OF

retrospective reviews mandated by Congress; and 3) seeking direct input from stakeholders and agency employees on which regulations should be modified. Plans included criteria for determining how regulatory reviews should be prioritized, as well as an initial list of programs, activities and regulations currently under evaluation or to be evaluated in the near term. In addition, agencies updated their internal regulatory decision-making procedures to reflect the principles of Executive Order 13,563.¹⁴

C. Agency Status Reports

The President ordered agencies to submit periodic status reports on their retrospective reviews.¹⁵ In 2012, agencies were required to submit their retrospective review status reports to OIRA detailing planned, active and completed regulatory actions in January, May and September.¹⁶ Thereafter, reports were scheduled for semi-annual submission in January and July.¹⁷

It is unclear if all agencies have submitted the four required reports thus far. The Environmental Protection Agency (EPA) has made four reports available on its website,¹⁸ but the Department of Labor (DOL) has only posted three reports.¹⁹ The retrospective review status reports, like the final plans, vary in length and amount of detail, which may indicate the level of importance, or lack thereof, an agency has assigned to the retrospective review process.

III. Results of Retrospective Review²⁰

Some agencies appear to have done little more than incorporate their current rulemaking activities into their status reports. For example, the Small Business Administration (SBA) has included 11 small business size standards regulations for various industries that it has recently reviewed or is in the process of reviewing in their January 2013 report.²¹ Rather than follow the intent of the retrospective review process as an additional requirement in the agency rulemaking process, the SBA simply incorporated an already congressionally mandated review of its size standards.²²

TRANSPORTATION, PLAN FOR IMPLEMENTATION OF EXECUTIVE ORDER 13563: RETROSPECTIVE REVIEW AND ANALYSIS OF EXISTING RULES 4-5 (2011).

¹⁴ Agency final plans are available for review at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system>.

¹⁵ Exec. Order No. 13,610, § 4, 77 Fed. Reg. at 28,470.

¹⁶ Retrospective Review Implementation, *supra* note 9, at 2.

¹⁷ *Id.* January and May 2012 reports are available on The White House website at <http://www.whitehouse.gov/21stcenturygov/actions/21st-century-regulatory-system>. September 2012 and January 2013 reports can be found on the individual agency websites.

¹⁸ <http://yosemite.epa.gov/oepi/RuleGate.nsf/>.

¹⁹ <http://www.dol.gov/regulations/>.

²⁰ This section of the memo only represents a brief overview of the results.

²¹ UNITED STATES SMALL BUSINESS ADMINISTRATION, FOURTH REPORT OF RETROSPECTIVE REVIEW EFFORT (2013), available at <http://www.sba.gov/sites/default/files/Fourth2012RetrospectiveReviewReport.pdf>. Small business size standards establish eligibility for federal financial assistance and government contracting activities and are used by agencies during the rulemaking process to assess the impacts of rules on small businesses.

²² Small Business Jobs Act, Pub. L. No. 111-240, § 1344, 124 Stat. 2504, 2545 (2010).

Other agencies appear to be engaged in more comprehensive review efforts to identify outmoded, ineffective, insufficient, or excessively burdensome existing regulations for review that may be ripe for revision or excision. The Department of Transportation's (DOT) January 2013 report is 65 pages long and details a wide variety of actions including: removing obsolete regulations; streamlining and clarifying regulations; consolidating duplicative requirements; updating regulations; and reducing the number of entities subject to certain regulations.²³

Given the scope of regulations subject to the retrospective review, only a limited number of actions have been finalized for which cost or paperwork burden reductions have been quantified. Some actions will provide meaningful burden reductions for small businesses; others, however, are less significant, make questionable burden reduction estimates or do not result in any quantifiable burden reductions.

One action that will reduce burdens for taxpayers that operate small businesses out of their homes is the simplified home office deduction. On January 15, 2013, the Internal Revenue Service (IRS) issued Revenue Procedure 2013-13, which permits taxpayers to elect a simpler method for determining the home office deduction beginning with their 2013 tax returns.²⁴ According to the Department of Treasury (Treasury), many taxpayers, including small businesses, were not taking advantage of this deduction due to the complexity of the provisions and difficulty calculating the deduction.²⁵ Treasury estimates that this change will eliminate 1.6 million hours of paperwork reporting if taxpayers choose the optional simplified formula.²⁶

Another action that will reduce actual existing burdens on small businesses is an EPA final rule that waives the regulatory requirements requiring the use of redundant technology to capture fuel vapors that escape when drivers fill their gas tanks.²⁷ EPA estimates long-term cost savings of \$91 million a year,²⁸ however, the \$91 million spread over tens of thousands of retailers that sell gasoline does not represent a significant savings for an individual gas station.²⁹

²³ UNITED STATES DEPARTMENT OF TRANSPORTATION, E.O. 13563 RETROSPECTIVE REVIEW REPORT FOR DOT (2013), available at <http://www.dot.gov/sites/dot.dev/files/docs/january-2013-dot-rrr-report-final.pdf>.

²⁴ Rev. Proc. 2013-13, 2013-6 I.R.B. 478, available at <http://www.irs.gov/pub/irs-drop/rp-13-13.pdf>. Individuals previously had to file a 43-line form (8829). Now taxpayers will be able to deduct \$5 per square foot for up to 300 square feet of office space, not to exceed \$1,500. Kathleen Pender, *IRS Simplifies the Home-Office Deduction, for 2013*, SAN FRANCISCO CHRONICLE, Jan. 15, 2013, available at <http://blog.sfgate.com/pender/2013/01/15/irs-simplifies-the-home-office-deduction-for-2013/>.

²⁵ <http://www.treasury.gov/connect/blog/Pages/Helping-Small-Business-Owners-and-Home-Based-Employees-Claim-the-Home-Office-Tax-Deduction.aspx>.

²⁶ UNITED STATES DEPARTMENT OF THE TREASURY, IMPLEMENTATION OF RETROSPECTIVE REVIEW PLANS STATUS REPORT 13 (2013), available at <http://www.treasury.gov/open/Documents/Revised%20Treasury%20lookback%20plan%20status%20repor%20January%202013%20AND%20burden%20reduction%20appendix%202%2028.pdf>.

²⁷ Air Quality: Widespread Use for Onboard Refueling Vapor Recovery and Stage II Waiver, 77 Fed. Reg. 28,772 (May 16, 2012).

²⁸ *Id.* at 28,772.

²⁹ EPA estimates that there are 30,600 gas stations that will benefit if 19 states and the District of Columbia remove the Stage II gasoline vapor recovery systems for gas stations from their State Implementation Plans. *Id.*

EPA also finalized a rule to ensure that milk producers are exempted from regulations designed to protect against oil spills.³⁰ The agency estimates that this change will save the dairy industry \$146 million annually³¹ and the revision was welcomed by dairy farmers. However, EPA had never actually interpreted the rules to apply to milk spills so some question the assertion that existing burdens are being reduced.³²

The National Marine Fisheries Service within the Department of Commerce (DOC) has stated that certain regulatory changes will reduce burdens on small businesses but the significance of the reduction is unclear due to a lack of information. One final rule eliminates the income qualification requirements for renewal of commercial Gulf reef fish permits and increases the maximum crew size for dual-permitted vessels from three to four.³³ In the DOC January 2013 status report, the agency states, “[a]lthough the overall effects of these changes are not quantifiable with available data, the final action is expected to increase the economic benefits to small entities.”³⁴

Finally, other reviews that may reduce burdens on small businesses seem to be under a never-ending review with no results in sight. For example, OSHA listed a review of its bloodborne pathogen standard in its final retrospective review plan³⁵ and on every subsequent progress report. The review had actually been suggested by a small business owner in 2008.³⁶ OSHA published the notice of the review in the Federal Register in 2010, pursuant to an already extant statutory requirement for reviewing regulations, not Executive Order 13,563.³⁷ The DOL progress reports show that the date by which OSHA expects to complete its review report has been pushed back several times. It remains to be seen whether the review of the standard will be completed this year.

³⁰ Oil Pollution Prevention; Spill Prevention, Control, and Countermeasure (SPCC) Rule—Amendments for Milk and Milk Product Containers, 76 Fed. Reg. 21,652 (Apr. 18, 2011).

³¹ *Id.* at 21,653.

³² Ike Brannon and Sam Batkins, *First-Year Grades on Obama Regulatory Reform*, REGULATION, Spring 2012, at 5, available at <http://www.cato.org/sites/cato.org/files/serials/files/regulation/2012/4/v35n1-7.pdf#page=2>.

³³ Fisheries of the Caribbean, Gulf of Mexico, and South Atlantic; Reef Fish Fishery of the Gulf of Mexico; Amendment 34, 77 Fed. Reg. 64,237 (Oct. 19, 2012).

³⁴ UNITED STATES DEPARTMENT OF COMMERCE, PROGRESS REPORT FOR EO 13563 3 (2013), available at http://open.commerce.gov/sites/default/files/Commerce%20Retrospective%20Plan%20Progress%20Report%20Table%202013%2001%2015_0.pdf.

³⁵ UNITED STATES DEPARTMENT OF LABOR, PLAN FOR RETROSPECTIVE ANALYSIS OF EXISTING RULES 15 (2011), available at <http://www.whitehouse.gov/sites/default/files/other/2011-regulatory-action-plans/departmentoflaborregulatoryreformplanaugust2011.pdf>.

³⁶ Scott George of Mid-America Dental and Hearing Center nominated the standard for review as part of the SBA Office of Advocacy’s Regulatory Review and Reform Initiative on February 28, 2008. http://archive.sba.gov/advo/r3/r3_medical08.html#med. It is unclear if Mr. George’s nomination prompted OSHA’s review; however, a letter shows that OSHA was considering a review of the bloodborne pathogen standard in 2008. Letter from Edwin G. Foulke, Jr., Assistant Secretary of Labor for Occupational Safety and Health, DOL, to Rep. Charles A. Gonzalez, Chairman, Subcommittee on Regulations, Healthcare, and Trade, House Committee on Small Business (Oct. 22, 2008), available at http://archive.sba.gov/advo/r3/resgonzalez08_1022.pdf.

³⁷ Regulatory Flexibility Act Review of the Bloodborne Pathogens Standard, 75 Fed. Reg. 27,237 (May 14, 2010).

IV. Conclusion

The initial estimate of the burden reduction that would be achieved, based on the regulatory initiatives listed in the final retrospective review plans, was \$10 billion.³⁸ Thus far, the actual results are far more modest and some of the burden reduction estimates have been questioned. Moreover, any reductions pale in comparison to ever increasing regulatory burdens.

By the Obama Administration's own estimates, the total cost of just 14 major rules in Fiscal Year (FY) 2012 was between \$14.8 billion and \$19.5 billion.³⁹ In FY 2012, more than 3,800 final regulations were issued.⁴⁰ A more comprehensive tally of regulatory activity shows that in 2012, 539 final rules added \$215 billion in new burdens.⁴¹

While there appear to be some genuine efforts to retrospectively review and reduce existing regulatory burdens, for the most part, the results are underwhelming. Many agencies appear to be focusing their review efforts on minor existing paperwork and compliance burdens, instead of reviewing existing significant rules. It is unclear if the retrospective review results thus far are the beginning of a real positive trend or will fall short of the laudable goals of reducing significant existing burdens on regulated entities, and in particular, small businesses.

³⁸ *Eliminating Job-Sapping Federal Rules Through Retrospective Reviews—Oversight of the President's Efforts: Hearing Before the Comm. on Small Business*, 112th Cong. 24-26 (2011) (statement of Cass Sunstein, Administrator, Office of Information and Regulatory Affairs, Office of Management and Budget).

³⁹ OFFICE OF MGMT. & BUDGET, OFFICE OF INFORMATION AND REGULATORY AFFAIRS, 2013 DRAFT REPORT TO CONGRESS ON THE BENEFITS AND COSTS OF FEDERAL REGULATIONS AND AGENCY COMPLIANCE WITH THE UNFUNDED MANDATES REFORM ACT 3 (2013), *available at* http://www.whitehouse.gov/sites/default/files/omb/inforeg/2013_cb/draft_2013_cost_benefit_report.pdf. OIRA states that, “[t]he estimates . . . are not a complete accounting of all the benefits and costs of all regulations issued by the Federal Government during this period.” *Id.* at 10.

⁴⁰ <http://americanactionforum.org/topic/2012-costliest-year-regulation-white-house-says>.

⁴¹ *Id.*